

Before The  
COPYRIGHT ROYALTY TRIBUNAL  
Washington, D.C. 20036

In the matter of            )  
                                  )  
Distribution of                )  
Cable Royalty Fees            )            Docket No. CRT 79-1

NAB MOTION FOR A STAY  
PENDING APPEAL OF THE  
TRIBUNAL'S FINAL  
DETERMINATION

Pursuant to Section 809 of the Copyright Act of 1976 and Rule 301.77 of the Copyright Royalty Tribunal ("Tribunal") governing cable royalty distribution proceedings, the National Association of Broadcasters ("NAB") for and on behalf of various member stations claiming 1978 cable royalties, hereby requests a stay of the Tribunal's September 23, 1980 Order, 45 Fed. Reg. 63026, pending judicial review of that decision to the United States Court of Appeals for the District of Columbia, and in any event, until such time as this Tribunal rules on this application.

In the alternative, NAB stations request that the effective date of the aforesaid Order and distribution of the 1978 cable

royalty fund be postponed pending a second application for the relief requested herein by the NAB to the Court of Appeals pursuant to Rule 18 of the Federal Rules of Appellate Procedure.

#### PRELIMINARY STATEMENT

Section 809 of the Copyright Act and 37 C.F.R. §301.75 governing cable royalty distribution proceedings make it abundantly clear that the broadcasters' appeal from the Tribunal's September 23, 1980 final determination allocating the 1978 cable royalty fund automatically prevents this Tribunal from distributing any 1978 cable royalties pending judicial review of that decision.

But even if these stay provisions failed to provide automatic stay protection here, the relief requested is clearly appropriate and necessary under the four criteria for adjudging stay requests: (1) the existence of substantial legal questions warranting judicial review; (2) the probability of irreparable harm to the applicants; (3) the lack of significant harm to other interested parties; and (4) the public interest.

While it is not necessary in every case that all of these

factors tip in favor of maintaining the status quo, here all four factors favor a stay pending appeal, particularly in light of the serious and difficult legal questions presented and the irreparable injury to all those concerned which would necessarily result absent such protection.

#### PROCEDURAL SETTING

On September 23, 1980, the Tribunal published its final determination distributing 1978 cable royalty fees (45 Fed. Reg. 63026, et seq.). According to 17 U.S.C. §809, absent the NAB's appeal from that Order filed on October 17, 1980, the terms of that determination would have become effective 30 days after publication.

According to its final determination Order, the Tribunal awarded percentages of the royalty fund to five groups of claimants. In descending order of size, those awards were: program syndicators, 75%; joint sports claimants, 12%; non-commercial broadcasters, 5.25%; music performing rights societies, 4.5%; and commercial television broadcasters, 3.25%. The Tribunal rejected the claims of radio claimants as well as those of character claimants.

Pursuant to Section 810 of the Copyright Act (17 U.S.C. §810) and Rule 301.77 of the Tribunal's regulations, NAB on October 17, 1980, filed an appeal from this determination with the United States Circuit Court of Appeals for the District of Columbia and served notice of appeal on all the

parties to these proceedings (a copy of the docketed Notice of Appeal and accompanying Certificate of Service is annexed hereto as Appendix A). As required by the statute and regulations, the appeal was filed and notice served within thirty days of the September 23 Order, thereby triggering the automatic stay provisions of 17 U.S.C. §809.

### ARGUMENT

#### Point I

THE BROADCASTERS HAVE CLEARLY  
MET THE STANDARDS REQUIRED FOR  
THE ISSUANCE OF A STAY PENDING  
JUDICIAL REVIEW OF THE TRIBUNAL'S  
FINAL DETERMINATION

Section 809 of the Copyright Act makes it abundantly clear that the issuance of a stay is mandated solely by virtue of NAB's filing of an appeal from the Tribunal's final determination on October 17, 1980, and its service of notice of that appeal. Section 809 reads as follows:

"Any final determination by the Tribunal under this chapter shall become effective thirty days following its publication in the Federal Register as provided in section 803(b), unless prior to that time an appeal has been filed pursuant to section 810, to vacate, modify, or correct such determination, and notice of such appeal has been served on all parties who appeared before the Tribunal in the proceeding in question. Where the proceeding involves the distribution of royalty fees under section 111 or 116, the Tribunal shall, upon the expiration of such thirty-day period, distribute any royalty fees not subject to an appeal filed pursuant to section 810." (Emphasis added) 17 U.S.C. § 809.

Rule 301.77 of this Tribunal, governing the effective date of the Tribunal's final cable royalty distribution also provides an automatic stay of such determinations pending appeal:

"A final determination by the Tribunal shall become effective thirty days following its publication in the Federal Register, unless an appeal has been filed prior to that time pursuant to 17 U.S.C. 810 to vacate, modify, or correct a determination, and notice of the appeal has been served on all parties who appeared in the proceeding." 37 C.F.R. §301.77

The reason for these automatic stay provisions is obvious when one considers the devastating situation which would result if the Tribunal failed to issue a stay and a Court of Appeals subsequently modified or vacated the Tribunal's final distribution order. Without the prophylactic effect of a stay maintaining the status quo and preventing distribution of the fund pending appeal, royalty awards can and will be distributed in lump sum payments to the associations representing various claimant groups - each of which in turn represents a multitude of claimants. All of these associations must, according to agreements reached among their members, parcel out the group's allocations to the claimants within the group, thereby causing a myriad chain of distribution.

Accordingly, once the cable royalty fund is disbursed

pursuant to the September 23 Order, royalty monies will be literally scattered across the country and totally unrecoverable in the event that the Tribunal's royalty allocations are modified or vacated by a reviewing court. Indeed, if this Tribunal fails to stay distribution of royalties pending the NAB appeal, much more is at stake than mere inconvenience to the parties. Should there be any remand or reversal of the Tribunal's final determination, the Tribunal will be called upon to perform the impossible task of wresting royalty monies back from countless claimants to whom those monies were prematurely distributed. In short, without stay protection, even a successful appeal by NAB becomes largely academic since the royalties at stake will have been irretrievably lost by that point.

Moreover, it is readily apparent that the broad and fundamental questions encompassed by NAB's appeal place the entire distribution scheme contemplated by the Tribunal and all of the 1978 cable royalties into controversy. Obviously, each award is part of a finite whole, and if one allotment changes, the others must perforce shift accordingly. Given that the size of each claimant group's allocation is, in large

measure, dependent upon the amounts allocated other groups, it is at best "wishful thinking" to assume that any part of the royalty fund can be isolated and paid out while complex legal and factual questions remain unresolved by judicial review.

This is particularly true in light of the fact that NAB stations are seeking relief from the Tribunal's rulings on three major legal issues which cut into more than 87% of the fund: the copyrightability of the stations' program compilations, the stations' entitlement to royalties for syndicated programming exclusively licensed to them, and their copyright ownership of sports programming produced and recorded by NAB stations.\*

Indeed, if the Tribunal is reversed on the compilation issue, all of the monies awarded other claimant groups will be affected - and to an extent impossible to predict at this point. As NAB stations demonstrated below, the "broadcast day" created by the stations is a copyrighted work separate and apart from the individual programs constituting it. As such, broadcasters owning the copyright in such works are entitled to royalties separate and apart from all other royalty awards as compensation for their efforts required in arranging and compiling all of the programming aired on distant signals.

\* In this regard, it must be noted that the broadcasters' claim below for 21% of the 1978 royalty fund solely reflected their claims for their locally-produced non-sports programming, and in no way reflected the amounts due them in the event their claims for compilation, syndicated, and sports programming are granted on appeal.

Likewise, if the exclusive license and sports issues are modified on appeal, all of the royalties awarded those represented by the Motion Picture Association of America ("MPAA") and the Joint Sports Claimants ("Sports Claimants") will necessarily be shifted to some incalculable degree. And, without question, the NAB's intended challenge of the distribution criteria and factual bases used to reach final distribution determination will produce substantial changes in the ultimate allocation of royalties among the claimant groups. But even beyond this, since the NAB plans to challenge the constitutionality of Section 111, it would be illogical and totally inappropriate for the Tribunal to attempt to isolate any portion of the royalties and distribute what remains while the Court of Appeals reviews the distribution scheme set forth in the September 23 Order.

In short, given the complexity and breadth of the questions NAB is raising for review, the entire royalty fund is "subject to appeal" per the terms of 17 U.S.C. §809. Accordingly, since NAB has filed a timely appeal of the final determination and has served notice on all parties to the proceedings, the Tribunal must grant NAB's application for a stay and postpone distribution of all royalties pending judicial review.

Point II

EVEN ABSENT THE AUTOMATIC STAY  
PROVISIONS OF 17 U.S.C. §809,  
A STAY IS APPROPRIATE BECAUSE  
THE EQUITIES TIP DECIDEDLY IN  
FAVOR OF MAINTAINING THE STATUS  
QUO PENDING THE NAB APPEAL

As shown above, this Tribunal is clearly obligated to issue a stay postponing royalty distribution pursuant to the automatic stay provisions provided by §809 of the Copyright Act and 37 C.F.R. §301.77. But, even without the benefits of those statutory provisions, stay protection is obviously necessary and appropriate in this case according to §705 of the Administrative Procedure Act, i.e., 5 U.S.C. § 705, and Rule 301.50(c) of this Tribunal. Those provisions permit an agency to "postpone the effective date of action taken by it pending judicial review" upon a determination that "justice so requires."

The factors considered by the courts in determining whether justice requires that administrative action be stayed pending judicial review are summarized in Virginia Petroleum Jobbers Association v. FPC, 104 U.S. App.D.C. 106, 259 F.2d 921, 925 (D.C. Cir. 1958), cited with approval, Permian Basin Area Rate Cases, 390 U.S. 747, 773 (1968); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d

841 (D.C.Cir. 1977). These factors are, in brief, whether petitioner will suffer irreparable damage if the stay is not granted, whether the public interest calls for denial of the stay, whether substantial harm will be caused other interested parties, and whether there is a likelihood of probable success on the merits. None of these factors is in itself dispositive; each must be balanced against the other equitable considerations which Virginia Petroleum requires tribunals to consider. See American Home Products Corporation v. Finch, 303 F.Supp. 448 (D.C.Del. 1960). In short, the Tribunal may exercise its discretion, and grant a stay for any reason so long as "justice requires."

The D.C. Circuit has recently eliminated the uncertainty surrounding the last of these factors - the likelihood of success on the merits - when it held that "the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors" and not a showing by petitioner that ultimately it will prevail on the merits "more likely than not." Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., supra at 559 F.2d 843-844. As the Court of Appeals in Holiday Tours explained, the following standard is required of petitioners seeking stay protection:

"An order maintaining the status quo is appropriate when a serious legal question is

presented, when little, if any, harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success."

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"What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on admittedly difficult legal questions and when the equities of case suggest that the status quo should be maintained." 559 F.2d 844-845  
(Emphasis added.)

That standard is fully met in this case.

The size of the agency record, the length of the Tribunal's opinion supporting its final determination and the limited time available before that determination becomes effective make it impossible to set forth an exhaustive analysis showing why the equities tip decidedly in favor of a stay. Rather, the NAB can only point to some of the more difficult legal questions warranting judicial review and the serious equity considerations requiring the stay protection requested:

- 1) the Tribunal's erroneous interpretation of the Copyright Act of 1976 which led the Tribunal to deny the broadcasters' royalty claims based on their compilation, syndicated and sports

programming; (2) the Tribunal's flawed procedure and analysis of the record; (3) the irreparable harm to broadcasting stations absent a stay and the lack of injury to other parties in the event stay protection is granted; and (4) the public interest in support of postponing distribution of the 1978 fund.

Point III

A STAY IS APPROPRIATE IN LIGHT OF  
THE TRIBUNAL'S ERRONEOUS INTER-  
PRETATION OF THE COPYRIGHT ACT

As was demonstrated in Point II above, it is not necessary for an applicant seeking a stay to demonstrate that its ultimate success on appeal is wholly without doubt or even that there is a substantial likelihood that it will succeed on the merits. Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., supra at 559 F.2d 841. All that is required is a showing that petitioner has raised "questions going to the merits so serious, substantial, difficult and doubtful as to make them fair grounds for litigation" and that the balance of hardships tips decidedly in favor of granting a stay pending appellate review of those questions. See Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953), cited with approval, Washington Metropolitan Area Transit Commission v.

Holiday Tours, Inc., supra at 559 F.2d 844. This is obviously the case where, as here, the issues on appeal are extremely complex and have not been tested by any court.

In its final determination,\* the Tribunal rejected the broadcasters' claims for royalties based on their copyright ownership of certain sports, syndicated movies and series and "broadcast day" compilation programming. The Tribunal's reasoning in support of these holdings is clearly erroneous:

"We find that Section 111 and its legislative history reflects the Congressional intent, and the understanding of interested parties, that television stations are to be compensated only for eligible locally-produced programs."  
(CRT Opinion, 31)

This conclusion rests on the Tribunal's erroneous interpretation of Section 111(d)(4)(A) of the Copyright Act, which makes it clear that the Tribunal is only authorized to distribute royalties to copyright owners of works carried on a distant signal.

Relying on misconceived notions of "legislative history", the Tribunal ignored this statutory mandate in Section 111 and reached the conclusion that Congress intended that: (a) royalties

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\* All page references herein with respect to the Tribunal's final determination are made to the September 22, 1980 "print and inspection" advance copy of that decision [hereinafter "CRT Opinion"], rather than to the decision as it appears in the Federal Register.

for all syndicated programming should be distributed to program syndicators and not to local stations (CRT Opinion, 31); (b) royalties for all sports programming be distributed to the sports leagues notwithstanding the copyright ownership of that programming (CRT Opinion, 40); and (c) no royalties be awarded for cable use of the broadcasters' compilation programming (CRT Opinion, 29). The Tribunal reasoned as follows:

"The language of the new Act relating to compilations and other subject matter of copyright, as well as definitions and other technical provisions, was drafted long before Congress considered what is now Section 111. These provisions are of general application and do not reflect the specific attention which the Congress gave to cable television issues."  
(CRT Opinion, 29)

It is readily apparent from this and the remaining text of the Tribunal's opinion that its interpretation of Section 111 flies in the face of the fundamental principle of statutory construction that all statutes be construed as a whole, absent express statutory provisions to the contrary.\* Accordingly, it will be emphasized on appeal that it was erroneous for the Tribunal to rely upon the concocted type of "legislative history" advanced by opposing claimant groups and disregard the cardinal purpose and plain meaning of Section 111 - the sole determinants of legislative intent here - as defined by those portions of the new Act which set forth the meaning of copy-

8 See 2A Sutherland on Statutory Construction § 48.1.

rightable works and copyright ownership.

Furthermore, the Tribunal erroneously relied upon extemporaneous statements made by interested parties during subcommittee hearings in order to ascertain the "legislative intent" behind the Act. However, these statements provide no basis for denying the broadcasters' claims for several reasons.

First, the concept of "legislative intent" is useful in interpreting statutory meaning only if it is understood to mean the objective composite or net meaning communicated by the legislature, and not the subjective intent which might be conveyed by statements and opinions of individual legislators.\* Accordingly, formal committee reports are the most reliable sources for ascertaining statutory meaning.\*\*

Second, since statements made by the committee member in charge of the bill upon the bill's presentation to the floor form the only exception to this rule, none of the statements relied upon by the Tribunal are probative of legislative intent.\*\*

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\* See, e.g., Harrison v. Northern Trust Co., 317 U.S. 476 (1943); Day v. North American Royon Corp., 140 F.Supp. 490 (E.D. Tenn. 1956); see, generally, A Re-Evaluation of Use of Legislative History in the Federal Courts, 52 Col.L.Rev. 125 (1952); Cox, Judge Learned Hand and the Interpretation of Statutes, 60 Harv.L.Rev. 370 (1947); 73 Am.Jr.2d. Statutes §175 and cases cited therein.

\*\* See Sutherland on Statutory Construction §48.14, and cases cited therein.

However, even the remarks of the legislator sponsoring the bill during the course of its consideration on the floor must be used cautiously, since the bill's sponsor often assumes and performs that function at the instance of private parties interested in procuring its passage, and in fact, knows no more about the legal ramifications of the bill than anyone else.\*

Third, statements made by interested parties during subcommittee hearings, including those made by representatives of the NAB, are rarely, if ever, used to ascertain legislative intent. Indeed, the full text of the subcommittee hearings show that the NAB lobbyists quoted in the Tribunal's opinion were in no position to project the inter-relationship between the various drafts of Section 111 and the rest of the revision Act, nor could they have been, since none of NAB's substantive claims herein were ever directly in issue during those hearings.

Finally, none of the so-called "legislative history" relied upon by the Tribunal can be used to override the plain meaning and overall legislative purpose of Section 111. As we emphasized during the December, 1979 hearings below, both the

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\*See Sutherland on Statutory Construction §48.16, (1973), p. 222.

language and purpose of Section 111 are unequivocally clear: under the Copyright Act of 1976, all copyright owners of any works included in distant non-network secondary transmissions are entitled to a share of the compulsory royalty fund to compensate them for cable use of their works.\*

(a) The Tribunal's Denial of the Broadcasters' Royalty Claims for Compilation Programming

In addition to citing the "legislative intent" behind the Act, the Tribunal rejected the broadcasters' royalty claims for cable use of their broadcast programming because, in its view: (a) the language of Section 111(d)(4)(A) limits distribution of cable royalties to copyright owners "of a program only, that is, a particular show"; (b) the daily combination of programs and other matter included in the stations' broadcast day programming material does not comprise a "work" within the meaning of Section 111(d)(4)(A); and (c) even if the stations' broadcast day programming were considered a work within the meaning of that Section of the new Act, the stations' compilation of programming "is an unlawful use of programs licensed to the station for broadcast purposes only" (see CRT Opinion, 28).

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\* See 2 Nimmer on Copyright, §8.18[E][4][d][i].

As was fully demonstrated below, however, none of these contentions have any merit. According to Section 101 of the new Act, compilations are fully protectible "works" within the meaning of the Act, separate and apart from the underlying materials assembled. As copyright owners of those works, broadcasters must be compensated for cable use of their broadcast day compilations, along with all other owners of works included in non-network secondary transmissions. This result is entirely consistent with, and indeed, is apparently the basis for the Tribunal's finding that the musical rights societies are entitled to royalties.\* The Tribunal's failure to adopt the same approach with respect to the broadcasters' compilation programming is therefore arbitrary and capricious and grounds for reversal.

The same is true with respect to the Tribunal's interpretation of "program" as that word is used in Section 111(d)(4)(A). Apparently, the Tribunal accepted the MPAA's argument that compensation to broadcasters for cable use of their compilation programming was not contemplated by the Act because the language of that Section speaks in terms of royalty compensation for "secondary transmission...of a television program." 17 U.S.C. §111(d)(4)(A). If this interpretation were consistently applied,

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\* This is not intended to suggest that the NAB's royalty claims for compilation programming stand or fall with those of the musical rights societies. Rather, the thrust of these arguments is that the Tribunal is without authority to reject the claims of one group for reasons it chooses to ignore when accepting similar claims by other groups.

however, the musical rights societies would have no standing to claim royalties, since obviously that group does not claim copyright ownership of a "program".

Even beyond this, however, it should be noted that throughout that portion of the House Report explaining Section 111, the term "program" is used virtually interchangeably with "work", "program material" and "programming." For example, within the language of Section 111(d)(4) itself, "program" is equated with "programming". Likewise, comparison between Section 111(d)(4)(B) with Section 111(d)(4)(C)\* shows the same interchangeable use of the words "programming" and "program." In short, Section 111 must be read to provide royalties for all copyright owners of any work included in a distant non-network secondary transmission, for it is obvious that absent express statutory language to the contrary, no "work" should be singled out for unfair discriminatory treatment.

The Tribunal also accepted the MPAA's argument that the broadcast day should be disallowed because its assembly is unauthorized notwithstanding that fact that there is absolutely

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\* This subsection must be read in conjunction with Section 111(d)(2) which is couched in terms of "programming."

no basis for the Tribunal's conclusion that this is in fact the case with respect to the stations' programming compilations. In reality, the course of dealing between the stations and program syndicators reveals that syndicated programs are compiled for copyright purposes in a manner precisely contemplated and implicitly agreed to by the syndicators. During argument, the MPAA could not deny that syndicators without exception license their programming to stations, knowing full well that their programming will be combined with that owned by other syndicators, in an arrangement totally within the discretion of the broadcasters.

Moreover, there is simply no basis for the conclusion that the stations' compilations do not provide substantial benefit to cable operators. There is uncontroverted testimony on the record that a program's success or lack of success depends upon the licensee station's ability to develop the optimum mix and arrangement of its programming. (See 5/29/80 testimony of Richard Hughes.) Indeed, the Tribunal found this to be the case at page 45 of its Opinion when it wrote that:

"From the evidence we concluded that cable syndicators generally will elect to transmit those stations which offer a programming mix that has maximum popularity and/or appeal to their subscribers who pay money for this service."

In light of these considerations, it is abundantly

clear that the Tribunal's denial of the broadcasters' claims based on their broadcast day compilations is reversible error. Accordingly, since NAB stations have filed a timely appeal, the Tribunal's final determination has served notice of appeal on all participants in these proceedings, and the Tribunal must grant NAB's application for a stay postponing the distribution of the entire 1978 cable royalty fund.

(b) The Tribunal's Denial of the Broadcasters' Royalty Claims for Syndicated Programming Exclusively Licensed to the Stations

Apparently, the Tribunal rejected the broadcasters' royalty claims for syndicated programming on the basis of the MPAA's interpretation of the legislative history behind the Act. For all of the reasons outlined above, however, none of the so-called "legislative history" cited by the Tribunal overrides the fact that Section 111(d)(4)(A) must be read in light of the rest of the Act, including Section 201(d)(2) and the House Report explaining Section 201(d)(2), which recognize the divisibility of copyright.\*

Contrary to the Tribunal's decision regarding the "exclusive licensee" issue, the statutory language and legislative history of that section can only be interpreted to mean that local broadcasting stations holding exclusive licenses to transmit a particular work in a particular geographical area

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\* See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 123 (1976).

for a particular period of time are the copyright owners of the work, entitled to all of the rights, protection and remedies accorded all other copyright owners by the Act, including the right to receive cable royalty fees. See 17 U.S.C. §201(d)(2). As was fully demonstrated in the proceedings below, the broadcasters' right to royalties based upon their exclusive licenses is entirely independent of any rights they may have under the FCC's syndicated exclusivity rules (i.e., to force cable systems to delete syndicated programming from its distant signal). See, e.g., 122 Cong. Rec. 31984, 32013 (cum. ed., September 22, 1976). Moreover, it was also shown below that broadcasters' rights as exclusive licensees of syndicated programming are not limited to bringing an infringement action under Section 502(c). See generally, 4 Nimmer on Copyright §12.02 (1979).

The Tribunal's decision totally ignores this, and misses the mark of the central substantive point here: any station which purchases an exclusive license to transmit a particular program within a particular geographical area from the program's producer automatically succeeds to the producer's copyright ownership in that program with respect to those rights, and is therefore entitled to cable royalties. We submit, that on the law and the facts, it inevitably follows that the station and not the program producer is the copyright owner of that program within the areas covered by its exclusive license with the program producer.

Significantly, the record indicates that program suppliers may be presently renegotiating their contracts with the stations to include specific language granting the suppliers cable royalties for the programs exclusively licensed to stations. It is absolutely clear that if the arguments asserted by the MPAA were dispositive of the issues raised by the stations, there would be no need for any such contractual revisions.

These considerations justify issuance of a stay pending appeal, given the complexity of issues and substantial impact of the uncertainties created by this aspect of the Tribunal's final order.

(c) The Tribunal's Rejection of the Broadcasters' Royalty Claims for Sports Programming

Consistent with its denial of the broadcasters' royalty claims for syndicated and compilation programming, the Tribunal erroneously found "the legislative history to be dispositive of [the sports] issue." (CRT Opinion, 40). The Tribunal went on to find that "common law principles and customary business relationships between the sports teams and broadcasters confirmed [its] understanding of the Congressional intention concerning the distribution of cable royalties for sports programming" (CRT Opinion, 41). This latter conclusion in and of itself is obviously reversible

error in light of the new Act's express preemption of common law in the area of copyright and the total lack of evidence establishing the existence of such "customary business practices" between stations and teams.

Taken to its logical conclusion, the Tribunal's decision on the sports issue means that copyright initially vests in the teams rather than the broadcasters which author and fix the programming in issue. Obviously, this runs afoul of Section 101 of the new Act. In addition, according to the 5/23/80 testimony of Arnold Wadler, Assistant General Counsel for Metromedia, Inc., as well as the 4/25/80 testimony of David Stern, General Counsel of the National Basketball Association, only a relatively small number of teams actually produce and record their own sports coverage.

Accordingly, in most instances, the station produces and fixes the programming and the only contribution made by the teams is their performance of the game itself, which, as a matter of law, is not a contribution that rises to the standard of copyrightability. This evidence, coupled with the fact that the Tribunal refused during Phase II to consider any arrangements demonstrating the broadcasters' copyright ownership in sports programming other than those "specifically distributing cable royalties to the broadcasters" establishes reversible error.

POINT IV

THE TRIBUNAL'S FLAWED ANALYSIS  
AND USE OF DISTRIBUTION CRITERIA  
REQUIRE POSTPONING ANY DISTRIBUTION  
FROM THE FUND PENDING APPEAL

For agency action to pass muster under the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), "[t]he agency must articulate a 'rational connection between the facts found and the choice made.'" Bowman Transportation, Inc. v. Arkansas Best Freight, 419 U.S. 281, 285 (1974), quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962). Particularly when the agency's decision constitutes a novel ruling of great impact, it warrants close scrutiny on judicial review. See, e.g., Office of Communications v. FCC, 560 F. 2d 519 (2d Cir. 1977); Columbia Broadcasting System, Inc. v. FCC, 454 F. 2d 1018, 1026 (D.C. Cir. 1971). The Tribunal's attempted analysis of the economic impact issues in this case and application of its so-called "marketplace value" criterion cannot be sustained under these tests because the facts found are not rationally connected to the choices made by the Tribunal.

As the broadcasters maintained below, the compulsory license scheme in Section 111 was designed to supplant the traditional market forces which ordinarily determine a copy-

right owner's remuneration. In short, the Tribunal's attempt to reconstruct the marketplace according to its perception of what the market value of program categories would have been absent Section 111's compulsory license totally defeats the purpose behind enactment of such a license.

Moreover, the legislative history of the Act clearly shows that the Senate Judiciary Committee, and ultimately Congress, expressly rejected all amendments which would have granted sports programming special exemption or treatment under the compulsory license provisions of Section 111, notwithstanding the greater popularity (and marketplace value) of that programming. Accordingly, it will be argued on appeal that the marketplace criterion used by the Tribunal bears no rational relationship to the legislative purpose behind Section 111 and constitutes reversible error.

#### POINT V

THE BROADCASTERS WILL SUFFER  
IRREPARABLE HARM IF A STAY  
IS NOT ISSUED

A controlling factor in determining whether justice requires that administrative action be stayed pending review is the extent to which the petitioner will suffer irreparable harm if the stay is not granted. See, e.g., Virginia Petroleum Jobbers Association v. FPC, supra at 259 F. 2d 925; Washington

Area Transit Commission v. Holiday Tours, Inc., supra at 559 F. 2d 844-845.

The type of harm sufficient to justify a stay of administrative action has been characterized as "real, immediate and incalculable harm." Joint Anti-Fascist Refugee Committee v. McGrath, 351 U.S. 123 (1951) (concurring opinion of Justice Douglas) cited with approval in Isbrandtsen Co. v. United States, 93 U.S. App. D.C. 294, 211 F. 2d 51 (1954), cert. denied, 347 U.S. 990 (1955).

The injury that NAB stations will suffer if a stay is denied is so palpable that it is beyond meaningful debate. As demonstrated earlier, any distribution of royalty funds is virtually an irreversible process. Recovery of the awards once they are in the hands of opposing claimants, if possible at all, would involve costly and protracted litigation virtually throughout the country. In reality then, failure to stay the awards would deprive the broadcasters of the very remedy they are seeking on appeal.

Other adverse effects, not easily quantifiable, would also occur. Particularly when copyright ownership is at stake, courts have presumed the existence of irreparable harm; since copyright encompasses property interests of an intangible nature, damage to such interests is not susceptible of precise proof. Because the object of a stay is to preserve the status

quo, it is therefore customary for tribunals to presume irreparable harm once a litigant has shown that such an interest is likely to be impaired.

The same considerations apply in the present action. As indicated earlier, the Tribunal's decision virtually impacts the whole fabric of the cable television industry. There is every indication that the regulated parties will conduct their day-to-day business affairs with reliance upon the Tribunal's interpretation of Section 111(d)(4) of the Copyright Act. The reality of this situation puts the broadcasters at an extreme economic and competitive disadvantage in their business relationships with program suppliers and sports teams, as well as countless other third parties, who will interpret the decision to mean that broadcasters do not own the copyright in much of their own programming.

These considerations make it clear that the broadcasters' injury is totally unsusceptible of adequate measurement. Accordingly, the stay protection sought herein is both necessary and appropriate at this juncture.

#### POINT VI

OTHER INTERESTED PARTIES  
SUFFER LITTLE, IF ANY, HARM  
FROM ISSUANCE OF A STAY

The other side of the equity equation requires the Tribunal to look at the impact of a stay on other parties to

the proceeding. Since the Tribunal, as well as other claimants to the fund, can only profit from prompt judicial resolution of the uncertainties surrounding cable royalty distribution, this is not a particularly difficult task. Indeed, the slight impact on those parties is as obvious as the adverse effect on the broadcasters. Clearly, the only harm they could conceivably suffer is a delay in receipt of their royalty awards -- to the extent they are ultimately found to be appropriate. In short, claimants will merely receive whatever royalties they are entitled to later, augmented by interest, rather than now.

Thus, in contrast to the broadcasters' harm, there is nothing "irreparable" about postponing distribution of all royalty awards, since opposing claimants do not run any risk of irreversible loss of royalty entitlements. Their royalty awards remain intact and available, subject, of course, to the results of judicial review. When weighed against the total loss of legal remedy that the NAB would risk if a stay is denied, the scales tip decisively in favor of the broadcasters.

#### POINT VII

#### ISSUANCE OF A STAY BEST SERVES THE PUBLIC INTEREST

Parties aggrieved by administrative agency action act as representatives of the public interest in seeking review.

Virginia Petroleum Jobbers Association v. FPC, supra at  
259 F. 2d 925:

"The interest of private litigants must give way to the realization of public purposes. Public interest may, of course, have many faces - favoring at once both the rapid expansion of [industry] and the prevention of wasteful and repetitive proceedings at the taxpayers' and consumers' expense; both fostering competition and preserving the economic viability of existing public services; both expediting administrative action and preserving orderly procedure. We must determine, these many facets considered, how the court's action serves the public best."

A stay of the September 23, 1980 final determination comports with this standard, by preventing multiplicity of litigation, expediting resolution of the issues, fostering administrative efficiency and avoiding enormous economic waste.

#### CONCLUSION

For all the foregoing reasons, the NAB respectfully requests that the Tribunal, on the law and in the exercise of its discretion, grant a stay of its September 23, 1980 final determination and postpone distribution of any and all 1978 cable royalties pending final resolution of the NAB appeal of that decision to the United States Court of Appeals for the District of Columbia Circuit and in any event, up to and including publication of the

Tribunal's decision on this application and alternately, for a temporary stay pending a second application for this relief by NAB to the United States Court of Appeals for the District of Columbia Circuit in the event that such an application is necessary.

Dated: October 22, 1980

Respectfully submitted,

COUDERT BROTHERS

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UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT

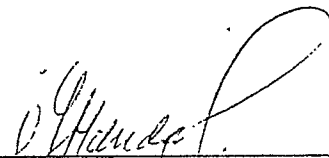
----- -x  
: NATIONAL ASSOCIATION OF BROADCASTERS, :  
: Petitioner, :  
: -against- :  
: COPYRIGHT ROYALTY TRIBUNAL, :  
: Respondent. :  
----- -x

NOTICE OF APPEAL

Docket No. 80-2213

Notice is hereby given that the National Association of Broadcasters, for and on behalf of certain broadcasting stations claiming compulsory cable royalties for 1978, hereby appeals to this Court from the final determination of the Copyright Royalty Tribunal published on September 23, 1980 in the Federal Register (45 Fed. Reg. 63026), distributing the 1978 cable royalty fund pursuant to Section 111 of the Copyright Act of 1976 (17 U.S.C. §111, et seq.).

Dated: New York, New York  
October 16, 1980

By   
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Coudert Brothers  
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Washington, D.C. 20006  
(202) 783-3010

UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT

-----x  
: NATIONAL ASSOCIATION OF BROADCASTERS, :  
: Petitioner, : NOTICE OF APPEAL  
: -against- :  
: COPYRIGHT ROYALTY TRIBUNAL, : Docket No.:  
: Respondent. :  
-----x

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above-mentioned Notice of Appeal has been served upon participants in the proceedings from which the appeal is being taken, to wit:

Mary Lou Burg,  
Chairperson  
Copyright Royalty Tribunal  
1111 20th Street, N.W.  
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Dated: October 16, 1980

By   
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Before The  
COPYRIGHT ROYALTY TRIBUNAL  
Washington, D.C. 20036

MEMORANDUM OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS  
IN SUPPORT OF APPLICATION  
FOR A STAY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within Memorandum of the National Association of Broadcasters in Support of Application for a Stay of the Tribunal's final determination, 45 Fed. Reg. 46026, has been served by first class mail, postage paid, upon the following participants in the 1978 cable royalty proceedings:

- \* Mary Lou Burg  
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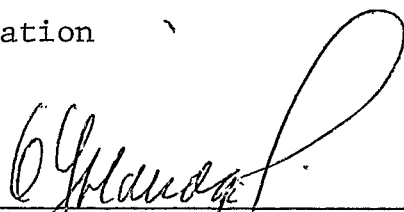
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Canada

Dated: October 22, 1980

By

  
\_\_\_\_\_  
CARLETON G. ELDRIDGE, JR.  
Attorney at law  
Coudert Brothers  
200 Park Avenue  
New York, New York 10166

\* Those designated by asterisk were also served by hand on  
on October 23, 1980

OCT 23 1980 ORIGINAL

COUDERT BROTHERS

ATTORNEYS AND COUNSELLORS AT LAW

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BY HAND

October 22, 1980

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AV. ALMIRANTE BARROSO, 81  
20000 RIO DE JANEIRO, R. J.

Chairman Mary Lou Burg  
Copyright Royalty Tribunal  
1111 20th Street, N.W.  
Washington, D.C. 20006

Re: NAB Application for a Stay Pending Appeal  
Docket No. CRT 79-1

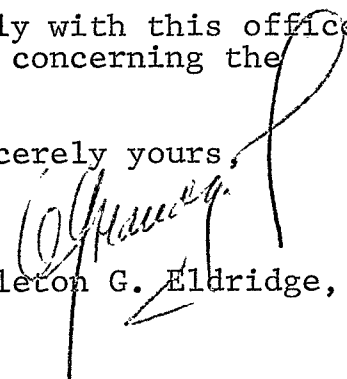
Dear Chairman Burg:

Transmitted herewith, on behalf of our client National Association of Broadcasters ("NAB"), are the original and seven copies of NAB's Motion for a Stay pending appeal of the Tribunal's final determination, to which a copy of NAB's Notice of Appeal from the Tribunal's September 23, 1980 Order and Certificate of Service dated October 17, 1980 are annexed.

NAB respectfully requests a stay pending a final determination on its appeal to the United States Court of Appeals District Court or, in the alternative, until such time as it can make a second application to that Court for the stay protection required herein in the event such an application should be necessary.

Please communicate directly with this office in the event you have any questions concerning the above.

Sincerely yours,

  
Carleton G. Eldridge, Jr.

CGE:ar  
Enclosures